United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

106

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,335

UNITED STATES OF AMERICA

v:

JAMES A. PROCTOR, Appellant.

Appeal from the United States District Court
for the District of Columbia

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Appointed by this Court

November 23, 1970

INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (CONTD.)

CONSTITUTION AND STATUTES:

*Cases chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLANT

The appellant, James A. Proctor, appeals from a conviction in the United States District Court for the District of Columbia of the crimes of second degree burglary (22 D.C. Code §1801(b)), grand larceny (22 D.C. Code §2201), robbery (22 D.C. Code §2901), and carrying a dangerous weapon (22 D.C. Code §3207). Concurrent sentences were imposed, totaling 5 to 15 years. This Court has jurisdiction to consider this appeal by virtue of 28 U.S.C. §1291.

The sentences were imposed on May 28, 1970, and a notice of appeal was filed on that same day, May 28. Chief Judge Bazelon, in Chambers, on October 20, 1970, ordered that this appeal be "consolidated for all purposes" with the appeal in No. 24,336, United States v. Robert L. Armstead.

QUESTIONS PRESENTED

1. Was there any evidence, direct or circumstantial, from which the jury could determine beyond a reasonable doubt that the appellant was one of those who in fact committed the crimes of burglary, grand larceny and robbery?

[Appellant desires the Court to read pp. 4-12, 28-33, 48-53, 58-60, 66-70, 80, 85-87, 97-103, 115-116 of the trial transcript.]

2. Was it proper to instruct the jury that it could infer from the unexplained possession of stolen property that the accused possessor is the party who committed the crime where (a) there were multiple larcenous takings and multiple suspects, (b) there was no stolen property found on the person of the accused or in the area under his personal dominion, and (c) there was no other competent evidence to identify the accused as the culprit?

[Appellant desires the Court to read the entire charge to the jury, pp. 302-326 of the trial transcript.]

3. Did the arresting officers have probable cause to arrest the occupants of an automobile on the basis of a general and inaccurate description of the automobile and its occupants contained in a police radio-run broadcast?

[Appellant desires the Court to read pp. 6-21, 36, 58-59 of the transcript of hearing on the motion to suppress.]

4. Does the Fourth Amendment permit a warrantless search of the locked trunk of an automobile, after the point when the occupants thereof have been arrested, where there was no probable cause to suspect that any contraband articles were hidden in the trunk?

[Appellant desires the Court to read the same pages listed after the preceeding question.]

[This case has not previously been before this Court.]

REFERENCES TO RULINGS

1. Denial of motions to suppress, pp. 58-59 of transcript of hearings on motions.

2. Denial of motion for judgment of acquittal, pp. 111-112 of trial transcript.

STATEMENT OF THE CASE*

A. The Indictment

The indictment in this case was filed on August 18, 1969. Originally, it contained seven counts and named three defendants --- Charles G. Luck, Jr., James Proctor and Robert L. Armstead. The defendant Luck pleaded guilty (Tr. 331) and the indictment, as submitted to the jury, was amended by striking Luck's name wherever it appeared [1/] and by striking the one count that concerned Luck alone (Tr. 312). As thus amended, the indictment's six counts charged:

First Count: On or about June 13, 1969, within the District of Columbia, Proctor and Armstead entered the dwelling of one Bruno Cozzi with intent to steal property of another. This was a charge of second degree burglary in violation of §1801(b) of Title 22, D.C. Code.

Second Count: On or about June 13, 1969, within the District of Columbia, Proctor and Armstead stole property of Bruno Cozzi and

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*In this brief, "Tr." refers to the transcript of trial, while "Mot." refers to the transcript of the hearing on the motion to suppress evidence.

1/ Luck had been named as defendant, along with Proctor and Armstead, in Counts 1, 2, 3, 4, and 5. Luck had been charged alone in Count 6 with carrying a concealed pistol without a license therefor.

and personal property of the value of $122.38. Items (1) through (4) were alleged to be the property of Bruno Cozzi, while item (5) was said to be the property of Orsola Cozzi. This was a charge of grand larceny in violation of §2201 of Title 22, D.C. Code.

Third Count: On or about June 13, 1969, within the District of Columbia, Proctor and Armstead entered the dwelling of Lamar H. Richards and Mary K. Richards with intent to steal property of another. This was a charge of second degree burglary in violation of §1801(b) of Title 22, D.C. Code.

Fourth Count: On or about June 13, 1969, within the District of Columbia, Proctor and Armstead stole property of Lamar H. Richards and Mary K. Richards of the value of about $1,891.00, consisting of (1) two television sets of the value of $418.00, (2) one pistol of the value of $35.00, (3) one tool box and tools of the value of $500.00, (4) one lazy susan of the value of $12.00, (5) crystal stemware of the value $15.00, and (6) other assorted household goods and personal property of the value of $911.00. This was a charge of grand larceny in violation of §2201 of Title 22, D.C. Code.

Fifth Count: On or about June 13, 1969, within the District of Columbia, Proctor and Armstead, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Isadore D. Richards property of the said Isadore D. Richards of the value of about

$29.00, consisting of one wallet of the value of $5.00 and money in the amount of $24.00. This was charge of robbery in violation of §2901 of Title 22, D.C. Code.

Sixth Count: On or about June 13, 1969, within the District of Columbia, the defendant Proctor alone "did carry, openly and concealed on or about his person, a dangerous weapon, capable of being so concealed, that is, a pistol without a license therefor issued as provided by law." This was a charge of carrying a dangerous weapon in violation of §3207 of Title 22, D.C. Code.[2/]

B. The Motion to Suppress Evidence

Prior to trial, the defendant Proctor moved to suppress as evidence certain property that had been seized at the time of his arrest. More particularly, the motion sought a court order directing that

> . . . certain property, described in the indictment herein, and which in the afternoon of the 13th day of June, 1969, in the vicinity of Eighth Street, Southeast, in the District of Columbia, from a 1969 Chevrolet Impala in which movant was a passenger, was unlawfully seized by one or more members of the District of Columbia Metropolitan Police Department, whose true names are unknown to movant, be suppressed as evidence against him in any criminal proceeding. Movant further states that the property was seized without a search warrant, not as an incident to a lawful arrest of movant, and even if an incident to a lawful arrest, said seizure was nevertheless invalid.

This motion also joined the movant, the defendant Proctor, in the pending motions of his co-defendants for suppression.

[2/] This charge had originally been labelled Seventh Count, and was renumbered after the charges against Luck were stricken from the indictment. The original Sixth Count had charged Luck with carrying a dangerous weapon.

On November 7, 1969, a hearing was held before District Judge Pratt relative to these motions to suppress. The transcript of that hearing is before this Court.

The arrests of all three suspects —— Proctor, Armstead and Luck —— were made by two plainclothes policemen, Officers Charles Carrick and Charles Haynes of the Criminal Investigation Division. From the testimony of Officer Haynes at the hearing on the motions, it appears that the two officers were cruising in the Northeast section of the District at about 1:05 p.m. on June 13, 1969, when they heard the following police dispatch on their car radio (Govt. Ex. 1, Mot. 4, 41; Def. Ex. 5, Tr. 175):

> Sct. 64: Addition information on the lookout for 2 Burglaries, 2nd. Degree and 1 Robbery Fear. Happened 12:15 p.m. todays date, at 808 and 806 Elder St. N.W. Lookout is for number one, negro male, 25 to 30 years, medium complexion, 5 foot 7, medium build, he's wearing a white sailor cap pulled down over his ears. No further on him. Number 2 is a negro male, 25 to 30 years, he's 5 foot 4, stocky build, has a mustache, wearing a blue and white stripped sweatshirt, and grey trousers. Number 3, negro male, 25 to 30 years, 5 foot 4, medium build. He was wearing a tan shirt. No further. Subjects obtained approximately $23 in bills from the robbery and unknown amount of merchandise from the 2 burglaries.
>
> Disp: Okay, and can you give a repeat on the auto and direction again?
>
> Sct. 64: 64, that auto was a 1969 Metallic Blue automobile, make unknown, bearing Virginia registration 85-12, last numeral unknown. And they were last seen east in the 800 block of Elder Street N.W.

At 2:40 p.m., about an hour and a half following the receipt

of this dispatch, the officers were cruising near 8th Street and Massachusetts Ave., N.E. At that point they saw a car meeting the general description of the dispatch headed south on 8th Street. Mot. 9-10. The car, testified to as a blue Chevrolet with license tag numbers 85-172, was stopped at a traffic light.[3/] Three Negro males were observed in the car, two in the front seat and one in the rear. The person in the right front seat "had on a sailor's hat." Mot. 10; but cf. Tr. 59 (person in back had on such a hat).

Noticing the similarity of the car to the one described in the broadcast, the officers turned their own car around and followed the vehicle. They caught up with the car and surrounded it as it was stopped at a red light in the 200 block of 8th Street, S.E. Mot. 11. As Officer Haynes approached, he removed his service revolver from his holster. He testified that "the person in the right front started bending over" and that he [Haynes] then "jerked open the door and observed a gun on the floor of the front seat of the car." Mot. 12. Haynes yelled to Carrick that "They've got a gun" and thereupon ordered everyone in the car to place their hands on top of their heads. Mot. 12. Haynes also

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[3/] Officer Carrick testified at the trial that the car bore "Virginia license tags -- rental tags--85274." Tr. 59. See also Mot. 21.

stated that "Upon looking in the back seat, I observed a butt of a gun sticking out of work clothes in the back seat of the car." Mot. 12. This gun "was right alongside . . . [the] right leg" of the person in the back seat. Mot. 12.

From among the persons then in the courtroom at the hearing, Haynes identified Proctor as the person in the right front seat of the car,[4/] Armstead as the driver, and Luck as the person in the back seat of the car at the time of the arrests. Mot. 13. After these three individuals got out of the car, they "were all searched there in the street and advised of their rights, handcuffs placed on them" and, after they were placed in separate transportation, "the car was then searched." Mot. 13. Using the car keys to open the trunk of the car, the trunk was searched and "we recovered another rifle and some other property, some money." Mot. 14. Among the property thus found were "12 nickels, 16 pennies, two dimes, and it was all thrown right in with some dishes, . . . several dishes, a lazy Susan, as I recall, and a place mat setting. I don't have the list here of all the things, but they were some of the things that were in there." Mot. 15.

The arrests of the three individuals, by concession of the Government, "took place when they [the officers] actually took the defendants out of the car" and "ordered the occupants out, and

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4/ Officer Haynes further testified that the individual in the right front seat was the one wearing the white sailor hat. Mot. 16. But the hat was never recovered following the arrests. Mot. 16-18. Moreover, at the trial, Officer Carrick testified that it was the person <u>in the back seat</u> - not in the right front seat - who "had on a white sailor hat." Tr. 59.

ordered them to raise their arms aloft." Mot. 33, 34. There was no evidence whatever that at any point the car had been speeding or had otherwise been operated in an illegal fashion; nor was there any evidence that the three individuals appeared to be fleeing in the car.

The question involved in this hearing, as District Judge Pratt put it (Mot. 36), was "whether these officers, at 1:40 p.m. [2:40 p.m.], on getting this radiorun, being at Massachusetts Avenue and Eighth Street and seeing a blue car headed south on Eighth Street with three males in it, bearing a tag number that began with 85, were justified in turning around, following them and stopping them the way they did."

After hearing arguments by counsel (Mot. 42-58), District Judge Pratt denied all the motions to suppress (Mot. 59). In so doing, he stated that "this is not a one-sided case" but that, "putting myself in the shoes of the officers at the time they spotted this car, and with the information that they had from the radiorun, I think that they had probable cause to proceed as they did." Mot. 58. He also added that "what I have said with respect to the arrest and what they got as a result of the arrest in the way of guns in the car can also apply . . . to the search of the trunk." Mot. 59.

C. The Trial

The jury trial took place on March 30 and 31, 1970, District

Judge Pratt presiding. The relevant testimony of the various witnesses concerning the events on June 13, 1969, may be summarized as follows:

Reverend Isadore D. Richards. Reverend Richards chanced to stop at his son's home at 804 Elder Street, N.W., at about 11 A.M. on that June 13. Through a rear door he noticed three individuals engaged in burglarizing the house. Tr. 4, 5. When he rushed around to the front door "two young fellows walked out of the house laden with the possessions of my son," including a portable TV. Tr. 5. And when he walked inside "the third man approached me and spun me around and asked me if I had any money and proceeded to rob me." Tr. 5, 6. About $23 or $24 was taken from his wallet. No gun was used in this robbery.

Reverend Richards, himself 5'7", attempted to describe the intruders to the police upon their arrival, stating that one intruder was about 5'7", another was taller and the third was shorter. Tr. 9. He further stated that the two men he saw coming out of the house had white hats pulled down to their eyes; one was said to be wearing blue slacks and a shirt to match and the other was wearing a tan outfit. Tr. 31, 32, 37. But Reverend Richards was unable to pick out or identify any of the three co-defendants from a subsequent police line-up. Tr. 27.

Lamar H. Richards. Mr. Richards, of 808 Elder Street, N.W. testified that certain property had been taken from his home on June 13, 1969. Tr. 41-43. This property, identified as Govt.

Exs. 2 and 3, included such items as work gloves, crystalware, place mats, a lazy susan and a "32" gun. Tr. 42.

Bruno Cozzi. Mr. Cozzi, of 804 Elder Street, N.W. identified Govt. Exs. 4 and 5 as items of property taken from his home on June 13, 1969. These consisted of a rifle, a rifle case and bullets. Tr. 43-45.

Pauline Croci. This witness was a neighbor, living in a house whose back yard abuts the back yard of the Richards home. On the day in question, she noticed a stranger "walking up the street" as well as "a car on the other side of the alley." Tr. 48. Her suspicions were aroused upon seeing someone moving around in the back seat of the car, which she described as "a blue Impala car" bearing Virginia license plates. Tr. 49. She memorized the license plate numbers at the time. A short while later she noticed three people running from the Richards house toward the blue car and she thereupon called the police. Tr. 49.

Mrs. Croci gave the police the tag numbers of the car, along with partial descriptions of the three suspects. Tr. 52. One individual was described by her as wearing a white sailor cap and as being 5 feet, 5 inches in height "or something like that." Tr. 53. Another suspect was said to be wearing light pants and tennis shoes. Tr. 56.

Charles R. Carrick. Officer Carrick testified as to the

events surrounding the arrests and the search of the car. He first observed "a 1969 metallic blue Chevrolet stopped at the red light" at 8th and Massachusetts Avenue, N.E. The car bore Virginia rental tags numbered 85274 and was occupied by "three Negro males." Tr. 59. The driver was wearing "a tan short-sleeve shirt," the person next to him "had a blue and white colored shirt," and the person in the back seat "had on a white sailor hat." Tr. 59.[5] Officer Carrick, together with Officer Haynes, turned and followed this car for four blocks, after verifying with the dispatcher that "this car had been the same that was involved in a burglary." Tr. 59.

After the car was stopped and surrounded, the search was made. Officer Carrick identified the following exhibits that were found and seized during this search:

(1) Govt. Ex. 2, consisting of personal property removed from the trunk of the car. Tr. 62.

(2) Govt. Ex. 3, consisting of a revolver recovered from the suspect Luck, who was seated in the rear of the car. Tr. 63.[6]

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[5] Officer Carrick later noted that the operator of the car, Armstead, also wore khaki colored trousers and had "a slight mustache." Tr. 66. Apparently no facial hair was noted on Proctor, but Luck wore a mustache. Tr. 66.

[6] When the car was first spotted, the person in the back seat [Luck] was seen wearing a white sailor hat. But when the car was stopped, he "didn't have the white hat on at that time." Tr. 74.

(3) Govt. Exs. 4 and 5, consisting of a .22 caliber rifle and ammunition recovered from the trunk of the car. Tr. 63.

(4) Govt. Ex. 6, consisting of "a Luger pistol that was taken from the front floor board of the passenger side of the car." Tr. 64. Proctor was identified as the person sitting in the right front seat, wearing a blue and white shirt. Tr. 65, 66. Officer Carrick had no knowledge that this Luger was involved in any crime, but he was told by his companion Officer Haynes that Proctor had just placed it on the floor board. Tr. 80.

(5) Govt. Ex. 7, consisting of a screwdriver and an axe, recovered from underneath the front seat on the driver's side. Tr. 65.

Officer Carrick conceded that the tag numbers relayed in the radio dispatch, 85-12, were incorrect. Tr. 69. The car that was stopped and searched bore the numbers 85-274. Tr. 69. At the time the car stopped by the officers, the car was moving "very slowly" and "we pulled in front of them and stopped them." Tr. 73.

Officer Carrick further stated that both Proctor and Armstead were "close to 6 feet" when standing, while Luck, the back seat occupant, was "a little shorter; possibly 5'9"." Tr. 68. He conceded that the radio broadcast indicated that the three suspects were shorter —— "one 5 foot 7 and two men 5 foot 4 inches." Tr. 68.

Charles Haynes. Officer Haynes, who had testified at the hearing on the motion to suppress evidence, testified further at the trial as to the circumstances of the arrests and search. The suspects' car was stopped and the plainclothed officers approached with drawn guns. In Officer Haynes' words,

> I jumped out of the cruiser and approached the car from the right; and as I was running towards the car, I saw the gentleman seated in the right front seat bend over and I observed an object in his hand and I yelled to Carrick that he's got a gun. I opened the door and recovered from the floor of the vehicle, a pistol. I directed the gentleman to get out and stand against the car. (Tr. 97).

This pistol was identified as Govt. Ex. 6 and the suspect in the right front seat was Proctor. Another gun, Govt. Ex. 8, was recovered from the back seat, where Luck was sitting. Tr. 98.

Officer Haynes also testified that he was about a foot from the suspects' car when he first saw the gun on the floor of the front seat and Proctor bending down. Tr. 102. The gun was plainly visible. A certificate was introduced as Govt. Ex. 9 to the effect "that Mr. Proctor did not have a license to carry a gun on this particular occasion." Tr. 109.

Officer Haynes, who is "nearly six feet tall," stated that both Proctor and Luck "got out on my side and they were both

taller than I was." Tr. 103. Armstead was not "quite as tall as I am." Tr. 103. The three suspects mentioned in the radio dispatch, however, were identified as (1) 5 foot 7, wearing a white sailor cap pulled down over his ears, (2) 5 foot 4, wearing a blue and white striped sweatshirt, and grey trousers, and (3) 5 foot 4, wearing a tan shirt. Def. Ex. 5.

James Proctor. After a Luck hearing (Tr. 119-129), District Judge Pratt ruled that "the impeachment of the defendant Proctor only by his 1964 conviction of petit larceny will be permitted and that the 1961 conviction of housebreaking, larceny and destroying private property will not be permitted." Tr. 128. On that basis, Proctor testified on his own behalf.

Proctor testified that he was 5 feet 10 1/2 inches in height. Tr. 130. On the morning of June 13, 1969, he was at his room in a rooming house at 130 Twelfth Street, N.E. About 1:30 P.M. he went briefly to a store, "bought some soda and came back up." Tr. 132. Shortly after his return Armstead and then Luck came up to his room.[7] Armstead "said he was going up to the Employment Agency and . . . asked me if I'd go so I said yes, I would go and see if I could get a job." Tr. 133. Luck then called Proctor aside in the hallway and showed him two revolvers that

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[7] Proctor testified that he had known Luck for about 5 years and that he and Armstead "are pretty good friends too." Tr. 146.

Luck had purchased and asked if Proctor would buy them; Proctor refused since he did not have enough money, and to Proctor's knowledge Luck "put them in his pocket and put them back in the car." Tr. 133. Armstead was not present during this discussion about the guns. Tr. 148. Proctor identified the weapons shown him by Luck as the German Luger and revolver that had been found in the car during the search. Tr. 150.

The three men then went downstairs and "out to the car parked in the back." Tr. 134. Proctor identified the car as "a blue Chevrolet Impala" that had been driven by Luck to Proctor's rooming house. Tr. 146. Proctor got in and sat in the right front seat, while Armstead drove and Luck sat in the back. Tr. 135. Proctor stated that Luck was wearing a green and black striped shirt and green slacks. Tr. 149. He further stated that he did not know where the guns were at this point or what was in the trunk of the car. Tr. 135, 149. At about 2:30 P.M. they started off toward the employment agency, said to be located in the 500 block of 8th Street, S.E. Tr. 136, 147.[8/]

[8/] At Tr. 136, Proctor stated that they were going to an employment agency "in the 500 block of 8th Street, N.E.", while the prosecutor at Tr. 147 referred to an agency "in the 500 block of 8th Street, S.E." The designation "N.E." at Tr. 136 may have been a reportorial error. The District of Columbia telephone directory lists an employment agency, known as Friendship N D P Employment Service, at 515 8th Street, S.E. This may have been the agency referred to, particularly since the suspects' car was traveling south on 8th Street toward the Southeast quadrant of the city. The car was stopped in the 200 block of 8th Street, S.E., near North Carolina Avenue. See Tr. 72.

As they approached an intersection at Massachusetts Avenue, slowing down for a stop sign or a red light, a dark red car pulled up by their side "and 2 Caucasian men came out with pistols." Tr. 136. These two men were not in uniform and did not announce their identity. When he saw a pistol pointed at him, Proctor "headed for the floor board." Tr. 138. But he had nothing in his hand at that time, and he did not touch or handle within the car any of the guns or weapons that were subsequently found and seized.[9/] When Proctor ducked down, he did not see any gun on the floor board, and he did not know what was under the floor board on the front seat. Tr. 139.

Proctor assumed that the two men were police and got out of the car voluntarily. He was personally searched by Officer Haynes, and "approximately 17 dollars in change" was removed from his pockets. Tr. 142. He was asked about what had happened to Luck's sailor hat, which Proctor described as a blue and white striped hat, but Proctor knew nothing about it. Tr. 140, 142.

[9/] Proctor stated that the only guns he handled were those shown to him by Luck in the hallway outside Proctor's room. Tr. 138-139. He contradicted Officer Haynes' testimoney that the gun was in plain sight on the floor board. Proctor testified that the gun was hidden from Haynes' view and that Haynes "had to go rooting around and fishing" before he found the gun "underneath the seat." Tr. 152.

When Proctor reached the precinct house, he asked what he was charged with, and upon being told that he was charged with robbery he said "I don't know what the man is talking about." Tr. 142, 143.

Proctor, upon being shown a color picture of the police line-up (Def. Ex. 1), identified the clothes he wore at the time of his arrest as a white shirt "with blue patterns" and green pants. Tr. 152. Armstead was shown as wearing a short-sleeved yellow shirt and gray pants with a stripe.

Proctor admitted, in response to the prosecutor's question, that he had been convicted of petit larceny in 1964. Tr. 157.

Robert Armstead. After a similar Luck hearing, as a result of which he admitted upon inquiry that he had been convicted of the unauthorized use of a motor vehicle in 1965 (Tr. 171), the co-defendant Armstead testified in his own behalf.

Armstead stated that he was 5 feet 8 1/2 inches in height, weighing 180 pounds. Tr. 160. When arrested he was wearing a bright yellow shirt and blue striped pants. Tr. 161. About 1:30 P.M. on June 13, 1969, he had gone to Proctor's rooming house, where he met both Proctor and Luck. He corroborated Proctor's testimony that the three men left by car to go to the employment agency. Tr. 163. Armstead drove the car partly because he knew

where the agency was located. Tr. 163. In addition, Luck had been drinking. And so "I drove because he was drunk and I knew where we were going, and because he let me." Tr. 169. The car itself was a blue Chevrolet and Armstead later learned it was rented. Tr. 164.

Armstead testified that prior to the arrests and search he had never seen any pistols or guns in the car, nor had he seen the hatchet and screwdriver under the driver's seat. Tr. 166. He had no occasion to look under the car seats and never even thought about looking in the trunk of the car. Tr. 166. Between $40 and $45 was found on his person.

D. The Instructions and Verdict

At the conclusion of the Government's case, and before the defendants Proctor and Armstead testified, the defendant Proctor moved for a judgment of acquittal on the first five counts.[10/] The defendant Armstead joined in the motion. Tr. 111. After hearing arguments by counsel on the motions, District Judge Pratt denied the motions. Tr. 116. He stated that, "viewing the Government's evidence in the best possible light and applying the theory of aiding and abetting, I think the jury could reasonably infer

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10/ The motion did not seek an acquittal as to the sixth count, dealing with the charge of concealing a dangerous weapon. Proctor's counsel stated that he felt that "there is evidence from which the jury might as reasonable men bring in a verdict of guilty on this count." Tr. 111.

that the defendant Proctor was acting in concert and could be charged as a principal just as if he had done every one of the acts involved in these burglaries." Tr. 115-116.

At the conclusion of the trial, District Judge Pratt gave appropriate instructions defining the crimes here charged: (1) burglary in the second degree, as charged in Counts 1 and 3 of the indictment; (2) grand larceny, as charged in Counts 2 and 4; (3) robbery, as charged in Count 5; and (4) carrying a dangerous weapon, as charged against Proctor alone in Count 6. Tr. 313-319.

The judge also instructed the jury relative to the inference that could be drawn from the stolen property found in the suspects' automobile. In so doing, however, he rejected (see Tr. 323) the request of Proctor's counsel that the "model" instruction be given as set forth in the appendix to this Court's opinion in Pendergrast v. United States, 135 U.S. App. D.C. 20, 34, 416 F. 2d 776, 790 (1969). Instead, the judge gave what he called "the red book instruction," which read as follows (Tr. 320 - 321):

> Now, in this case there is evidence from which the jury may draw the inference that the property taken from the two addresses on Elder Street was found in the automobile where the defendants were located at the time of the arrests.
>
> It is appropriate, therefore, that I charge you with respect to what is known as inference from the possession of recently stolen property.
>
> If you find beyond a reasonable doubt that the defendants were in exclusive possession of property of complainants and

> that this property had recently been stolen, and that the defendants' possession of the property on the date in question and under the circumstances in question has not been satisfactorily explained, then you may, if you see fit to do so, infer therefrom that the defendants are guilty of burglary in the second degree, grand larceny or robbery.
>
> You are not required to draw this inference, but you may do so if you deem it appropriate.
>
> The term "recently stolen" does not refer to any specific period of time. It is for you to determine, on the basis of all the facts and circumstances, whether the property was recently stolen. The longer the period of time since the property was stolen, the weaker is the inference which may be drawn from the possession of the property.

It should be noted that earlier in the charge the jury was instructed as to the presumption of innocence that attaches to a defendant throughout a trial (Tr. 306) and the Government's burden "to prove the guilt of the defendants beyond a reasonable doubt" (Tr. 306). The jury was told that a defendant "is not required to establish his own innocence under our system of laws" (Tr. 307) and as to each of the specific crimes mentioned in the 6 counts the court charged that the essential elements must be proved by the Government beyond a reasonable doubt (Tr. 313-318). And the jury was instructed that the burden on the Government was not only to prove beyond a reasonable doubt that the offenses were committed as alleged but that there must be proof beyond a reasonable doubt "that the defendants are the persons who committed the offenses" (Tr. 311). In other words, the jury was told that

it "must be satisfied beyond a reasonable doubt from the direct and the circumstantial evidence of the accuracy of the identification of the defendants before you convict them" (Tr. 311).

In addition, the following appeared in the charge relative to the possibility that Proctor might be found guilty of the charges as an aider and abettor (Tr. 321-322):

> Now, in this case there were originally three defendants. Now there are two. And there was evidence in the case that three individuals participated in these offenses. And the defendants are being charged with whatever the third defendant or the third individual did under the theory known in the law as the theory of aiding and abetting. And it is appropriate that I charge you as follows:
>
> You may find the defendants guilty of the crimes charged in the indictment without finding that they personally committed each of the acts constituting the offenses or that they were personally present at the commission of the offenses.
>
> Any person who advises, incites or connives at an offense or aids or abets the principal offender is punishable as a principal. That is, he is as guilty of the offense as if he had personally committed each of the acts constituting the offenses.

After due deliberation, the jury rendered its verdict, finding Proctor and Armstead guilty on Counts 1, 2, 3, 4, and 5 and Proctor alone guilty on Count 6. Tr. 327-328.

E. <u>The Sentence</u>

On May 28, 1970, District Judge Pratt sentenced the defendant Proctor as follows:

(1) 3 to 9 years on Count 1, and 2 to 6 years on Count 2, said sentences to run concurrently.

(2) 3 to 9 years on Count 3, and 2 to 6 years on Count 4, said sentences to run concurrently but consecutively with the sentences as to Counts 1 and 2.

(3) 5 to 15 years on Count 5, and 1 year on Count 6, said sentences to run concurrently with the sentences imposed as to Counts 1 through 4.

Thus the total sentences ran from 6 to 18 years. In July of 1970, counsel for the defendant Proctor moved for an order correcting the sentences by making them all concurrent so that the total sentence would be reduced to 5 to 15 years. The memorandum supporting this motion urged that since the jury may have found Proctor guilty as a principal solely under the aider and abettor instruction, he may have been punished twice for the same intent and same course of conduct contrary to the Double Jeopardy Clause of the United States Constitution.[11] In other words, Proctor's guilt as to Count 1 (the burglary of the Cozzi house) and as to Count 3 (the robbery of the Richards house) may have been grounded on the same aiding and abetting conduct, and to impose consecutive 3 to 9 year sentences on those counts would

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[11] Reference was here made to the discussion in the various opinions in Irby v. United States, 129 U.S. App. D.C. 17, 390 F. 2d 432 (1967), relative to the absence of any findings or conclusions to justify a term behond the maximum of the most serious offense.

be double jeopardy.

On August 17, 1970, District Judge Pratt granted the motion and ordered that the original sentence imposed on May 28, 1970, be changed so that all sentences would be served concurrently and the total sentence would be 5 to 15 years. The sentences as to the individual counts remained unchanged.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution - Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

22 D.C. Code §1801 - Burglary -- Penalties

"(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and

kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than two years nor more than fifteen years."

22 D.C. Code §2201 - Grand Larceny

"Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years."

22 D.C. Code §2901 - Robbery

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

22 D.C. Code §3207 - Carrying concealed weapons

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided,

or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

SUMMARY OF ARGUMENT

1. There was a lack of direct and circumstantial evidence from which a jury could determine beyond a reasonable doubt that the appellant was one of those who committed the crimes of burglary, grand larceny and robbery. Any verdict of guilt in those circumstances would necessarily rest on speculation and surmise. Thus it was error to deny the motion for judgment of acquittal that was offered at the close of the Government's case.

a. There was no direct evidence identifying the appellant as one of the culprits. The eye-witness identification of the three culprits' height and clothing differed significantly from those of the appellant, and no identification of the appellant could be made from the police line-up.

b. The prime circumstantial evidence relied upon by the Government and the jury was the fact that the car in which the appellant was riding when arrested was found to contain in its locked trunk many of the stolen articles. The jury was told that it could infer from that fact that appellant was guilty of the three crimes. But the Pendergrast-Johnson-Coggins trilogy of opinions by this Court demonstrates that such an inference is impermissible in the circumstances of this case, wherein there were multiple and separate larcenous takings

and multiple suspects. Moreover, none of the stolen goods had been found on appellant's person or in an area within the car that was under his personal dominion. The giving of the instruction as to the inference to be drawn from the possession of recently stolen articles, an instruction that was otherwise faulty, was reversible error in this case.

2. The arrests were illegal, being without probable cause. But even if the arrests be deemed lawful, the evidence seized in the locked trunk of the car should have been suppressed since the search was conducted without a warrant and without probable cause to believe that any of the stolen property was concealed in the car. The Supreme Court's decision in Chimel v. California, 395 U.S. 752 (1969), makes plain that a warrantless search incident to an arrest is permissible under the Fourth Amendment only to the extent that the search is confined to the person of the arrestee and to the area within the arrestee's immediate control. A warrantless search of an automobile in connection with an arrest of the occupants is subject to the same limitations, except where there is probable cause to believe that contraband may be secreted within the car. There was no such probable cause in this case. Hence the search was illegal and the seized goods should have been suppressed as evidence.

ARGUMENT

I. There was no evidence, direct or circumstantial, from which the jury could determine beyond a reasonable doubt that the appellant Proctor was one of those who in fact committed the crimes of burglary, grand larceny and robbery.

The Government's evidence was clearly sufficient to enable the jury to find that each of the offenses specified in Counts 1, 2, 3, 4 and 5 —— second degree burglary, grand larceny and robbery —— had been perpetrated by three men. All of the elements comprising the corpus delicti of each of these criminal offenses were proved beyond a reasonable doubt.

But the issue that loomed large at the trial, an issue that becomes a focal point of this appeal, was whether the appellant Proctor was in fact one of the three men who committed these crimes. It is the appellant's position that the direct and circumstantial evidence fell far short of the proof that would justify a jury in finding appellant guilty of these crimes beyond a reasonable doubt. In sum, the Government failed to meet the standard under which a trial judge is permitted to allow a criminal case to go to the jury. See Crawford v. United States, 126 U.S. App. D.C. 156, 375 F. 2d 332 (1967).

And since there was no evidence upon which a reasonable mind might fairly conclude beyond a reasonable doubt that the appellant

was one of the guilty three, the motion for judgment of acquittal should have been granted. Curley v. United States, 81 U.S. App. D.C. 389, 392-393, 160 F. 2d 229, 232-233 (1947). The denial of the motion by the trial judge permitted and indeed required the jury to rest its verdict on pure speculation rather than on proven facts. No such verdict can be permitted. Cooper v. United States, 94 U.S. App. D.C. 343, 345, 218 F. 2d 39, 41 (1954); Hunt v. United States, 65 App. D.C. 203, 205, 82 F. 2d 459, 461 (1936).

A. The Lack of Direct Evidence

The eye-witness descriptions of the three men who were seen committing the crimes were fairly precise, though somewhat limited in content. As reflected in the police radio dispatch, the culprits were three Negro males, each 25 to 30 years of age, with the following identifications:

> Number 1 was of medium complexion, 5 foot 7, medium build, wearing a white sailor cap pulled down over his ears.
>
> Number 2 was 5 foot 4, stocky build, had a mustache, wearing a blue and white striped sweatshirt and grey trousers.
>
> Number 3 was 5 foot 4, medium build, and wearing a tan shirt.

Reverend Richards, the chief eye-witness, testified that one of the intruders was 5 foot 7, another was taller and the third was shorter; two of them had white hats pulled down to their eyes, and one wore blue slacks and matching shirt and the other wore a tan outfit. Tr. 9, 31-32. And another eye-witness, Mrs. Croci, testified

that the man wearing a pulled-down sailor hat was about 5 foot 5 or 5 foot 7, had on light pants and a light short-sleeved shirt, and wore tennis shoes. Tr. 50, 53. She believed "the man driving the car had a goatee." Tr. 50.

In contrast, the three men arrested several hours later by the police, after the blue Chevrolet Impala was seen and stopped, bore the following physical characteristics as described by the arresting officers:

> James Proctor, in the right front seat, was "close to 6 feet." Tr. 68. In the words of Officer Haynes, who is "nearly six feet tall," Proctor was "taller than I was." Tr. 103. Proctor was further identified as wearing a blue and white shirt, but it was not described as striped. Tr. 66. He was not identified as wearing any kind of a mustache. Tr. 66.
>
> Robert Armstead, the driver of the car when it was stopped, was also described as nearly 6 feet tall. Tr. 68, 103. He wore a short-sleeved tan shirt with khaki trousers and had "a slight mustache." Tr. 66.
>
> Charles Luck, in the back seat, was described as "a little shorter; possibly 5'9"." Tr. 68. But Officer Haynes thought that Luck, like Proctor, was "taller than I was" —— i.e., taller than Haynes' height of "nearly six feet." Tr. 103. They were both "pretty big." Tr. 103. Luck had been seen wearing a white sailor hat, but it could not been found after the arrest. Tr. 59. He wore a mustache. Tr. 66.

The physical differences between the three observed culprits and the three arrested men are rather startling. Those differences are highlighted when an attempt is made to fit the appellant Proctor into the group of men seen committing the offenses. The observed individuals were all relatively short, none more than 5 foot 7,

and two of them but 5 foot 4. But Proctor was consistently described by the officers as nearly 6 feet tall.[12/] And while he wore a blue and white shirt, it seemingly did not match the blue and white striped shirt worn by one of the perpetrators. It was the person wearing the striped blue and white shirt who was described as only 5 foot 4 in height —— in contrast to Proctor's nearly 6 feet. Nor did Proctor possess the mustache seen on the individual wearing such a striped shirt.

All of these distinctions between Proctor and the persons described in the police broadcast culminated in the complete inability of Reverend Richards to identify Proctor or the other two arrested men in the police line-up. Tr. 27. Wearing the same clothes they had on at the time of their arrest, these men obviously possessed physical and clothing differences that completely distinguished them in Reverend Richards' mind from the three men he saw committing the offenses.

One is left with the chilling impression that the appellant Proctor was simply not among those who participated in these crimes, either as a principal or as an aider and abettor. And if that impression is correct, Proctor's conviction is the grossest kind of miscarriage. But the critical point now to be made is that

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12/ Proctor later testified that he was 5 feet 10 1/2 inches in height. Tr. 130.

the Government's direct evidence clearly did not show beyond a reasonable doubt that Proctor was one of those who committed the crimes in question or who aided in their commission.

Nor was there the slightest direct evidence that Proctor knew that any of the stolen articles were in the car or that he was knowingly aiding any other person or co-defendant in the commission of any crime or in the transportation of the stolen articles. In Count 5, for example, both Proctor and Armstead (and, originally, Luck) were charged with having stolen a wallet and $24 in money from Reverend Richards "by force and violence." Yet Reverend Richards was completely unable to identify Proctor (or any other defendant) as the one man who committed this robbery. And there was not even the hint of any direct evidence that this robbery was a part of any prearranged plan, that it was known or countenanced by anyone other than the single person who perpetrated the incident, or that Proctor in any way knew or could have known of the incident or aided in its commission.

Attention must therefore shift to the circumstantial evidence and the inferences which the Government sought to have the jury dr.w therefrom.[13/] Unless such evidence and inferences rationally show guilt beyond a reasonable guilt, Proctor's conviction on Counts 1 through 5 cannot stand.

13/ The Government prosecutor, in opposing the motion for

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B. The Lack of Circumstantial Evidence Justifying an Inference of Guilt

The prime circumstantial aspect of the evidence upon which the Government relied in seeking to prove the appellant's guilt beyond a reasonable doubt involved the fact that some if not all of the property stolen from the two houses was found in the automobile in which Proctor and the co-defendants were riding at the time of their arrest. The inference which the Government asked the jury to draw from that fact, an inference which was permissible under the judge's instructions, was that Proctor was indeed one of the thieves.

[Footnote 13 continued]

acquittal, urged that the Government "has shown circumstances wherein a reasonable man could infer, taking the Government's case at its best, that one of the men who left these residences was Mr. Proctor." Tr. 115. He added that such inference was supported by the "blue and white striped shirt, the description of which has been given although the Government admits that the other part of the description is not so good." Tr. 115; emphasis added.

That argument seems to concede that there was no direct evidence whatever to identify Proctor as one of the culprits, and the argument seems to eliminate Proctor as the principal under Count 5 (the robbery count). Everything seems to rest, under this view, on an inference derived from the assumed fact that Proctor was wearing a striped blue and white shirt. But that inference is impermissible since there was no evidence that his shirt was striped. Proctor later described his own shirt, as seen in the photograph of the police line-up, as white "with blue patterns." Tr. 152.

Within the past year this Court has had three occasions to examine in depth the scope and limitations of the well-established inference, which can be drawn by the jury under proper instructions and if so minded, that the unexplained or unsatisfactorily explained possession of property proven to have been appropriated in the commission of a recent larceny-type crime indicates that the possessor is the party who committed the crime. Pendergrast v. United States, 135 U.S. App. D.C. 20, 416 F.2d 776 (1969); United States v. Johnson, ___ U.S. App. D.C. ___, ___ F.2d ____ (No. 22,311, Sept. 4, 1970); United States v. Coggins, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 22,462, Sept. 4, 1970). This Pendergrast-Johnson-Coggins trilogy of opinions, however, has its most critical impact upon this case by force of the predicates to the inference that were therein recognized. Those predicates make clear that the inference is not judicially tolerable in the circumstances of this case. And the completely inadequate instructions to the jury concerning the use of the inference, instructions which did not even meet the standards of the model set forth in the Pendergrast opinion, augmented the error that marked the jury's reliance on such circumstantial evidence to determine that Proctor was among the three thieves.

The critical predicates or aspects of the inference in question, as explained in the Pendergrast-Johnson-Coggins trilogy, may be

related to the instant case as follows:

Pendergrast-Johnson-Coggins principles	Application of principles to instant case
1. "The Government must first prove beyond a reasonable doubt all elements comprising the corpus delicti of a criminal offense in the commission of which property was stolen." Coggins, slip opinion, p. 4.	1. Here, of course, the Government has tendered such proof of the three offenses of burglary, larceny and robbery. The basic predicate was thus established for invocation of the inference.
2. "The Government must then prove, by the same measure, that the accused had possession of the property recently after theft." Coggins, slip opinion, p. 4. Or, as explained in Pendergrast, 135 U.S. App. D.C. at 31, 416 F.2d at 787, "The inference is indulged only where the accused is found in exclusive possession of property recently stolen and the possession is not otherwise explained."	2. The Government did not prove that the appellant Proctor even knew that any of the stolen articles were secreted within the automobile; and there was no evidence that he had exclusive possession or control relative to the articles. Nor was his "presence in the car at the time of the arrests sufficient, we think, to show that he was in possession of the recently stolen articles here involved." Goodwin v. United States, 121 U.S. App. D.C. 9, 11, 347 F.2d 793, 795 (1965).
3. In multi-item thefts, "the court's instructions should also tell the jury that its consideration of unpossessed articles necessitates proof beyond a reasonable doubt that they were stolen along with the possessed articles. This is a matter of concern . . . such an admonition is indispensably necessary in all	3. No such instructions were given despite the clear fact that not "all of the items were purloined by a single act." Two separate houses (the Cozzi house and the Richards house) were ransacked, giving rise to two separate counts of second degree burglary and two separate counts of grand

Pendergrast-Johnson-Coggins principles	Application of principles to instant case
instances where it is not absolutely clear that all of the items were purloined by a single act. The unexplained or unsatisfactorily explained possession of a part of property recently stolen gives rise to an inference — that the possessor was the person who stole the whole — only in the event that all of the items, possessed and unpossessed, were stolen at one and the same time. The evidence must justify a finding beyond a reasonable doubt that there was but a single act of taking before the inference becomes judicially tolerable and, by the same token, the jurors must be similarly informed lest they risk attribution to the accused of a taking of all when he might well have taken only some." Coggins, slip opinion, p. 11.	larceny. Additionally, the act of robbery specified in Count 5 was an entirely separate act. In these circumstances, the inference becomes "judicially intolerable" and, absent proper instructions, the jury may have attributed to Proctor "a taking of all when he might well have taken only some," assuming he took anything at all.
4. In Coggins, slip opinion, p. 8, footnote 29, this Court noted with approval a Texas court decision to the effect that where there are multiple acts of taking the operation of the inference is limited to those goods found in the accused's actual possession. Clark v. State, 152 Tex.Crim. 446, 215 S.W.2d 184, 186-187 (1948).	4. In this case, none of the purloined articles were found in the actual possession of the appellant Proctor. The gun that he was alleged under Count 6 to have been carrying was not one of the stolen articles. The stolen property was recovered from the locked trunk of the car, an area not subject to the appellant's direct physical control.

Emergent from the Pendergrast-Johnson-Coggins trilogy is a principle that controls this case: the inference cannot be utilized to convict an individual of multiple and separate larcenous takings except as to those stolen articles in his actual possession. And even as to that narrow area of actual possession, carefully delineated instructions must be given the jury. See Coggins, slip opinion, p. 11. In this case, there were three separate larcenous takings and the stolen articles cannot by any stretch of the legal imagination be said to have been "taken at the same time." Coggins, slip opinion, p. 8.[14/] The appellant Proctor was not found to have in his "actual possession" or control any of the purloined articles, which were later discovered in the locked trunk of the car. Thus there was no room in this case for the operation of the inference. It was reversible error to allow the jury to draw the inference under these circumstances; and without the inference there remains "no evidence, either direct or circumstantial, which indicates" that the appellant Proctor was guilty of burglary, larceny or robbery. Borum v. United States, 127 U.S. App. D.C. 48, 49, 380 F.2d 595, 596 (1967).

14/ According to the indictment, there were two separate burglaries, two separate larcenies and one separate robbery. The indictment alleged no connection between the separate incidents and none was shown; the jury was free to convict as to only one burglary or one larcency and not as to the other burglary or larceny. Moreover, while the proof of the ransacking of the

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The impermissibility of the inference is made even more evident here by the fact that the inference was sought to be superimposed not only on multiple separate takings but also on multiple suspects, none of whom was otherwise sufficiently identified as a participant in the various crimes. The jury was quite properly told that (Tr. 310-311)

> You should give separate consideration and render separate verdicts with respect to each defendant as to each count. . . . Each defendant is entitled to have his guilt or innocence as to each of the crimes determined from his conduct and from the evidence that applies to him, as if he were tried alone. The guilt or innocence of any one defendant of any of the crimes charged should not control or influence your verdict respecting the other defendant. You may find one or both of the defendants guilty or not guilty.

But the instruction as to the use of the inference in these circumstances could only compound confusion and make more difficult the task of judging separately each defendant's guilt or innocence. Just as use of the inference in a multiple taking context might "risk attribution to the accused of a taking of all [the stolen items] when he might well have taken only some," Coggins, slip opinion, p. 11, so too the use of the inference in a multiple suspect context might risk an indiscriminate identification of all suspects found in the car as the perpetrators of all the crimes when one particular suspect might well be

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[Footnote 14 continued]
Richards house was detailed as to time and the number of the participants (Tr. 3-49), the proof of the larcenous takings from the Cozzi house consisted of nothing more than an identification of the articles stolen therefrom (Tr. 43-45). There was no proof that the Cozzi home was entered by three men on the morning of June 13, 1969, or that they were the same three men who entered the Richards house.

completely innocent or guilty as to only some of the crimes. The use of the inference where there are both multiple takings and multiple suspects, and where there is otherwise inadequate proof of identity, makes it virtually impossible for the jury intelligently to "give separate consideration and render separate verdicts with respect to each defendant as to each count."

This Court noted in Johnson, slip opinion, p. 9, that the requirement of "exclusive possession" of stolen property, which underlies the inference, may be met even though "the stolen property is not subject to the accused's direct physical control or located on premises under his dominion." And it was further noted that this requirement may be fulfilled "by a relationship to the stolen property that is shared with another so long as that relationship is significantly distinguishable from the connection others bear to the property." Ibid., pp. 9-10. But these broad concepts of possession have never been applied in a situation involving both multiple takings and multiple suspects. The aforementioned difficulty in applying the inference in such a context has led to the limitation of the use of the inference, where there is a multiplicity of takings or of suspects, to the stolen property subject to the accused individual's direct physical control or located on premises under his personal dominion. See Coggins, slip opinion, pp. 8, 11.

That limitation finds its fullest expression in this Court's decision in Goodwin v. United States, 121 U.S. App. D.C. 9, 347 F.2d 793 (1965). In that case, four individuals were in an automobile which, when stopped by police, was found to contain recently stolen articles. One of the occupants, Paul Vaughn, had not otherwise been identified as connected with the crime. His case had been submitted to the jury "on the idea that, being in the car when the officer stopped it, he was in possession of the recently stolen articles found therein." This Court completely rejected that notion and ordered Vaughn's verdict set aside. And so, the appellant Proctor being in the same position as Vaughn in the Goodwin case, the same result should follow here. Cf. Bailey v. United States, 128 U.S. App. D.C. 354,359, 389 F.2d 305, 310 (1967), where the Goodwin result was not followed because (a) three of the suspects had been identified as participants in the assault and robbery, and the fourth suspect was the driver of the car and hence the likely lookout for the others, and (b) all four suspects were found with "what was almost certainly part of the loot in . . . [their] immediate possession."

In short, the appellant Proctor not having been found to have had "possession of the property recently after the theft," Coggins, slip opinion, p. 4, either on his person or in the

area within his immediate control,[15] the use of the inference to identify him as one of the perpetrators of the three crimes constitutes reversible error. That conclusion is in no way affected by the possibility that the jury may have convicted the appellant as an aider and abettor rather than as a principal. Proctor was not charged with aiding and abetting, and there was no charge or proof as to who was the principal.[16] But more importantly, the jury made no special findings as to the basis for its verdict. For aught that appears, the guilty verdict may have rested exclusively upon the impermissible use of the inference here in question, as the instruction allowed.

It need only be added that the impropriety of permitting the jury to use the inference under these circumstances is not overcome by the fact that proper instructions may have been given as to aiding and abetting, or the presumption of

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15/ Compare the comparable area in which a warrantless search may be made following an arrest - i.e., "a search of the arrestee's person and the area 'within his immediate control' . . . the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763 (1969). Such would seem to be the same area within which stolen property may be said to be ir the accused's "exclusive possession" for purposes of the inference in question in situations involving multiple takings and multiple suspects.

16/ The Supreme Court has noted that "Aiding and abetting means to assist the perpetrator of the crime" and that "To be present at a crime is not evidence of guilt as an aider and abettor." United States v. Williams, 341 U.S. 58, 64 (1951).

innocence, or the Government's burden to prove beyond a reasonable doubt that the crimes were committed. As the Supreme Court has held, if a specific instruction on a vital issue is misleading or erroneous, "the error is not cured by a prior unexceptional and unilluminating abstract charge." Bollenbach v. United States, 326 U.S. 607, 612 (1946). Those abstract charges cannot hide the prejudicial impact of the inference instruction, particularly since none of them was specifically designed to cover the proof necessary to permit a finding that Proctor was in fact one of the perpetrators of the three crimes.[17/]

We are thus left with a situation where the very giving of any instruction as to the inference was prejudicial error. The proven facts were such as to make it improper for the jury to draw any inference of Proctor's guilt from the circumstance that recently stolen goods were found in the locked trunk of the car. Certainly the instruction itself, as given, made no attempt to limit or refine the inference in light of the multiple takings and the multiple suspects; nor did it seek to confine the jury's

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17/ While this Court in Johnson and Coggins excused the failure to give the type of instruction set forth in Pendergrast by reference to the adequacy of other instructions governing the presumption of innocence and the burden of proof beyond a reasonable doubt, neither Johnson nor Coggins dealt with a multiple taking situation where a very restrictive instruction as to the inference was necessary. Moreover, in those cases stolen property was found on the person of the accused or in an area under his dominion, thus making it appropriate for the jury to consider use of the inference. Such is not the case here.

attention to stolen goods that conceivably might be said to have been found on the appellant's person or in the area within his personal dominion. The judge even rejected the attempt of Proctor's counsel to have the jury instructed in accordance with the model charge attached to the Pendergrast opinion, a charge designed to avoid "the pitfalls encounterable" by District Court judges who so frequently are called upon to charge juries on this aspect of the law. In District Judge Pratt's words, "I overruled you on that and gave the red book instruction." Tr. 323. See the criticisms of that "red book instruction" in Johnson, slip opinion, p. 7, footnote 27; see also Coggins, slip opinion, pp. 9-11.

To have permitted the jury to act on such an inadequate and indeed erroneous instruction was to compel it to "act on what would necessarily be only surmise and conjecture, without evidence." Campbell v. United States, 115 U.S. App. D.C. 30, 32, 316 F.2d 681, 683 (1963). Therein lies the error of the appellant's convictions under Counts 1, 2, 3, 4 and 5.

II. The evidence seized in the locked trunk should have been suppressed since the search was conducted without a search warrant and without probable cause to believe that any of the stolen property was concealed in the car.

The appellant Proctor hereby adopts and incorporates by reference the arguments relative to the illegal arrest and the unreasonable search advanced at pages 10 to 14 of the brief for the appellant in No. 24,336, United States v. Robert L. Armstead, an appeal that has been "consolidated for all purposes" with the instant appeal. What is said hereinafter is supplementary to the contention in that brief that the search of the locked trunk of the car and the seizure of the stolen articles found therein were without probable cause within the meaning of the Fourth Amendment.

The Fourth Amendment's standard of probable cause turns upon the "practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949). And where the search is made by police at the time of making an arrest, the probable cause depends upon what "a reasonable, cautious and prudent police officer" might be expected to do in the circumstances, Bell v. United States, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86 (1958), subject to the limitations of the Fourth Amendment. Here the relevant circumstances,

against which the reasonableness of the police action must be tested, are:

(1) The receipt by the arresting officers of the police radio-run advising (a) that two burglaries and a robbery had been committed at stated addresses, (b) that a lookout was in effect for three Negro males, whose heights, approximate ages, and certain features of clothing were given, (c) that $23 in bills and an "unknown amount of merchandise" had been taken, and (d) that the suspects were last sean headed east in a 1969 metallic blue automobile, make unknown, "bearing Virginia registration 85-12, last numeral unknown." 18/

(2) The absence of any indication in the radio-run or otherwise that any of the stolen merchandise was being transported in the automobile, or that the articles were of such a nature as likely to be hidden within the automobile.

(3) The stopping of a blue Chevrolet Impala, bearing Virginia rental tags 85-274, as it slowly approached an intersection, there being no indication that the car was speeding or that the occupants were fleeing. The car was headed south, some six miles from the scene of the burglaries, and nearly three hours after those events. There was no cause to believe that the real culprits were still fleeing from the scene of the crimes three hours later.

(4) The almost instant observation by the officers, as they approached the stopped car, that one or more of the suspects or occupants had a gun.

(5) The immediate observation of the police officers that the occupants, upon getting out of the car and standing, were taller than the culprits described in the radio-run. It was at this point that the occupants were considered under arrest.

18/ This Court has recently observed that "Official radio-run descriptions, if close, will certainly help to justify an arrest," at least where the descriptions are "neither vague nor so general as to include a sizeable number of people." United States v. Thurman, U.S. App. D.C. , F.2d (No. 22,466, Oct. 28,

(6) The handcuffing of the occupants and the placing of them in a police car, followed by police use of the car keys to open the trunk and to seize the stolen articles. This search was undertaken at a point in time when there was no likelihood or possibility that the automobile would be quickly moved out of the locality or jurisdiction in which a warrant could have been sought.

Such were the circumstances confronting the arresting officers when the search was made. Placing those circumstances in juxtaposition with the established doctrines and limitations of the Fourth Amendment, appellant submits that the search and seizure must be considered unreasonable. A search warrant should have been and could have been obtained prior to the search.

Even if it be assumed that these various circumstances combined to justify the arrests of the car occupants, the search of the locked car trunk was not necessarily justified in the absence of a search warrant. The critical point is that the "search incident to arrest" concept has very limited scope, and what may be reasonable grounds for arrest can be far broader than what is a reasonable basis for search.

The Supreme Court in Chimel v. California, 395 U.S. 752 (1969), has recently traced the origins and development of the "search incident to arrest" principle. Its conclusion was that it is constitutionally reasonable for the arresting officer to search only as follows:

(1) to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape; (2) to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction; and (3) to search the area within the arrestee's immediate control, i.e., the area from within which he might gain possession of a weapon or destructible evidence. 395 U.S. at 763. Any search beyond those three categories, in the absence of a warrant, is per se unconstitutional, at least where there is no cause and no occasion to suspect more hidden contraband.

While the Court in Chimel was dealing with a search of a house that went beyond the bounds of constitutional reasonableness, the Court did not exclude the search of automobiles from these constitutional restrictions. There obviously are practical and constitutional differences between the reasonableness that justifies a search of a home and the reasonableness underlying a search of a movable object like an automobile. See Carroll v. United States, 267 U.S. 132, 153-156, 158-159 (1925). But those differences do not pertain to the scope of constitutional reasonableness of a search as an incident to an arrest. The differences extend only to the greater cause which an arresting officer may have to suspect at the time of the arrest that contraband is hidden in an automobile.

Thus in Chimel, 396 U.S. at 763-764, the Court noted with approval that Preston v. United States, 376 U.S. 364 (1964), had held

unreasonable the search of a locked trunk of an automobile where the search was made at another place some time after the arrest. And as explained in Chambers v. Maroney, 399 U.S. 42, 47 (1970), it was apparent in Preston at the time of the arrest "that the officers had no cause to believe that evidence of crime was concealed in the auto." See also Cooper v. California, 386 U.S. 58, 59-60 (1966). The thorough but warrantless search of the automobile involved in the Chambers case was approved only because "the police had probable cause to believe that the robbers, carrying guns and the fruits of the crime, had fled the scene in a light blue compact station wagon . . . [and there was] probable cause to search the car for guns and stolen money." 399 U.S. at 47-48.

The short of it is that under the Fourth Amendment a reasonable search of a car, as an incident to arrest, cannot go beyond the person of the arrestee or the area in the car within his immediate control —— unless there is probable cause to suspect that contraband is hidden in the car.[19/] Tested by that standard, the search and seizure in this case cannot be sustained. The arresting officers

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19/ In light of the Supreme Court's rulings in Preston and Chimel, this Court's contrary decision in Adams v. United States, 118 U.S. App. D.C. 364, 336 F. 2d 752 (1964), can no longer be considered as an accurate statement as to the right to search a locked trunk of a car without a warrant.

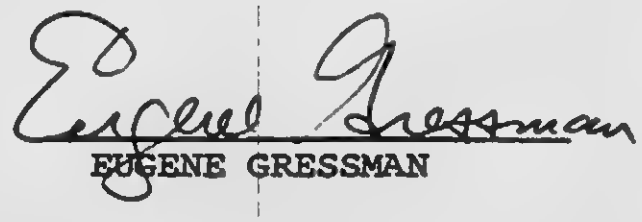
had no reason to suspect that, some three hours after the crimes in question, the culprits were still in hot flight from the scene in an automobile laden with the stolen articles. All they knew was that three poorly identified individuals had much earlier been seen driving east in a poorly identified blue automobile, and that the suspects had "obtained approximately $23 in bills and unknown amount of merchandise" from the burglaries.

Such sketchy information hardly qualifies as the probable cause that is constitutionally necessary to justify a warrantless search beyond the person of the arrestee and the area under his immediate control.

CONCLUSION

For the foregoing reasons, the appellant Proctor's conviction as to Counts 1 through 5 should be reversed.

Respectfully submitted,



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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,335

UNITED STATES OF AMERICA, APPELLEE

v.

JAMES PROCTOR, APPELLANT

No. 24,336

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT L. ARMSTEAD, APPELLANT

Appeals from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JEROME WIENER,
Assistant United States Attorneys.

Cr. No. 1581-69

INDEX

TABLE OF CASES

Cases—Continued

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

III

ISSUES PRESENTED *

In the opinion of appellee the following issues are presented:

1. Whether the evidence was sufficient to sustain appellant Proctor's convictions.

2. Whether the trial court, under the circumstances of this case, properly instructed the jury on the inferences to be drawn from possession of recently stolen property.

3. Whether the trial court properly denied both appellants' motion to suppress the evidence.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,335

UNITED STATES OF AMERICA, APPELLEE

v.

JAMES PROCTOR, APPELLANT

No. 24,336

UNITED STATES OF AMERICA, APPELLEE

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Appeals from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed August 18, 1969, each appellant was charged with two counts of burglary in the second

degree (22 D.C. Code § 1801(b)), two counts of grand larceny (22 D.C. Code § 2201), and one count of robbery (22 D.C. Code § 2901). Appellant Proctor was also charged with one count of carrying a dangerous weapon (22 D.C. Code § 3204).[1] Trial was held on March 30 and 31, 1970, before the Honorable John H. Pratt, sitting with a jury, and both appellants were found guilty as indicted. On May 15, 1970, appellant Armstead was sentenced to imprisonment for three to nine years on count one (burglary) and two to six years on count two (grand larceny), the sentences to run concurrently; three to nine years on count three (burglary) and two to six years on count four (robbery), the sentences to run concurrently with each other but consecutively to the sentences imposed on count one and two; five to fifteen years on count five (robbery), to run concurrently with the sentences imposed on counts one through four. On May 28, 1970, appellant Proctor was given identical sentences on counts one through five, plus a concurrent sentence of one year on count six[2] (carrying a dangerous weapon). These appeals followed and were consolidated by this Court on October 20, 1970.

The Offense

On June 13, 1969, at approximately 12:00 noon, Bruno Cozzi's home at 804 Elder Street, N.W., and then Lamar Richards' home at 808 Elder Street, N.W., were burglarized. A rifle in its case and some bullets were among the articles purloined from the Cozzi house, while a .32 caliber pistol, a lazy Susan, place mats and crystalware were among those taken from the Richards residence (Tr. 39-45). But for several fortuitous occurrences, the culprits would have managed to get away unobserved. However,

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[1] A third defendant, Charles G. Luck, Jr., who was also charged with all of the offenses, later pleaded guilty to one count of grand larceny.

[2] This charge was orginally count seven and was renumbered when the original count six, charging Charles Luck with carrying a dangerous weapon, was dismissed.

at 11:30 a.m. Mrs. Pauline Croci, a neighbor, alerted by the presence of a stranger wandering around the neighborhood, had observed a new blue Impala with Virginia license plates parked in a back alley (Tr. 48-49). Shortly thereafter Reverend Isadore Richards, father of Lamar Richards, decided to visit his son's house,[3] and upon approaching the back door he saw that it had been broken and splintered so that he could not use the key to gain entrance (Tr. 4-5). Seeing three men inside, he quickly concluded that "the house was being robbed" (Tr. 5) and ran to the front door, only to witness two of the three marauders carrying his son's possessions from the house (Tr. 5). Fearing that his granddaughter might be inside, he ran into the house and was quickly approached by the third man, spun around and relieved of approximately $23 from his wallet (Tr. 5-6). Standing on her porch, Mrs. Croci happened to see the three men flee from the Richards house and run towards the blue Impala. She alertly called the police (Tr. 49).

When the police arrived, Reverend Richards could describe only the two men he had seen carrying his son's property from the house. He remembered that one wore a "bluish" outfit and the other wore a tan and brown outfit. Both wore white sailor-type hats with the brims pulled down almost to their eyes (Tr. 8, 31). Mrs. Croci had partially remembered the license number of the blue Impala and also remembered that the men wore sailor caps (Tr. 50).[4]

The Arrest

At approximately 1:00 p.m. Detectives Kerick and Haynes heard on their police radio a report of a robbery and burglary, part of which was a lookout for three Negro males in a blue automobile bearing a Virginia tag includ-

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[3] The reverend had a key to the house (Tr. 4).

[4] Reverend Richards informed the police that the men were each approximately 5'8" tall (Tr. 8); Mrs. Croci told the police that she could only estimate the height of one of the men (Tr. 56) and that he was approximately 5'7" tall (Tr. 54).

ing the numbers 85-12.[5] One subject reportedly wore a blue and white sweater while another was described as wearing a tan shirt (Mot. Tr. 7-8).[6] The lookout also indicated that one subject wore a sailor cap (Mot. Tr. 7).

At approximately 2:30 p.m. the detectives observed a 1969 blue Chevrolet with tags 85-274, occupied by three Negro males, which was stopped at a light at Eighth Street and Massachusetts Avenue, N.E. (Tr. 58-59). The driver, appellant Armstead, wore a tan short-sleeved shirt (Tr. 66), and the man seated next to him, appellant Proctor, wore a blue and white shirt (Tr. 66). The detectives could only see that the man in the back seat of the car, Charles Luck, wore a white sailor hat (Tr. 59).[7] The detectives followed the car, and in the 200 block of Eighth Street, S.E., they swerved in front of the Chevrolet, blocking its path (Mot. Tr. 11, Tr. 59, 96). Alighting from their unmarked police car with pistols drawn, Detective Kerick approached the driver's side and Detective Haynes approached the passenger side (Tr. 59-60, 97). As he ran towards the car, Haynes saw that appellant Protor held "an object" and that he bent down toward the floor of the car (Tr. 97). Believing the object to be a gun, Haynes informed his partner and opened the car door to discover that the object was indeed a pistol (Tr. 97).[8] Haynes also saw Luck attempting to stuff something

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[5] "85" as a prefix to a Virginia license number indicates that the automobile is a rented car (Tr. 59).

[6] "Mot. Tr." refers to the transcript of the pre-trial hearing on appellants' motion to suppress evidence on November 7, 1969. At the conclusion of the hearing the court denied the motion (Mot. Tr. 58-59).

[7] We note an inconsistency in the transcript in that Detective Haynes testified at the hearing on the motion to suppress that the man seated in the front passenger seat wore the white sailor hat (Mot. Tr. 10).

[8] At the hearing on the motion to suppress Detective Haynes testified that he yelled to his partner *after* he opened the door and saw the gun on the floor of the front passenger seat (Mot. Tr. 12).

into the back seat, and after ordering the men from the car, he retrieved another gun from that area.[9] A search of the car's trunk revealed property taken earlier that day from the Richards and Cozzi homes (Tr. 42, 62-63).

The Trial

At trial, Reverend Richards and Mrs. Croci testified to their observations of the events of June 13, 1969. The reverend explained that his descriptions of the men could only be general in nature because of the exigencies of the situation and that he was not able subsequently to identify either appellant in a lineup (Tr. 19-38). Lamar Richards and Bruno Cozzi testified that on June 13, 1969, their houses had both been burglarized. Mr. Richards identified several of the items recovered from the trunk of the blue Chevrolet and the gun seized from the back seat as some of his possessions which were taken in the burglary (Tr. 41-42). Mr. Cozzi testified that the rifle and bullets taken from the trunk belonged to him and were part of the property taken from his house on June 13 (Tr. 44-45). Detectives Kerick and Haynes testified as to the arrest and made in-court identifications of both appellants (Tr. 65, 96). The Government then rested.

Both appellants testified that they were en route to an employment agency when they were arrested (Tr. 133, 163). Appellant Proctor said that he had been home alone all morning when he was visited at approximately 1:30 p.m. by appellant Armstead (Tr. 134) and later by Charles Luck (Tr. 133). At Armstead's suggestion the three decided to visit the employment agency and left the apartment bound for Luck's car.[10] They stopped for a few drinks in the back alley and proceeded to the car (Tr.

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[9] This gun recovered from the rear seat was later identified as the .32 caliber pistol belonging to Mr. Richards (Tr. 42, 63).

[10] Appellant Proctor testified that at one point in the conversation in his apartment, Luck called him into the hallway and attempted to sell him two revolvers (Tr. 133).

134). Armstead drove,[11] Proctor sat in the right passenger seat and Luck sat in the back seat (Tr. 135). Proctor further testified that on their way to the employment agency they were stopped by the police (Tr. 139-140). He denied holding a gun or even seeing one on the floor of the car (Tr. 140).[12] Appellant Armstead corroborated appellant Proctor's testimony.[13]

ARGUMENT

I. The evidence was sufficient to sustain appellant Proctor's conviction.

(Tr. 7-8, 38-44, 49, 50, 56, 58-65, 68-69, 97, 140, 159-162, 171)

It is well settled that on appeal, if the evidence is asserted to be insufficient, it must be reviewed in the light most favorable to the Government, with full allowance made for the right of the jury to assess credibility of witnesses and to draw justifiable inferences from the evidence adduced at trial. *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947). It is not necessary that the evidence rule out every reasonable hypothesis but that of guilt; it is sufficient if a reasonable man could find guilt beyond a reasonable doubt. *Curley* v. *United States*, *supra*, 81 U.S. App. D.C. at 392, 160 F.2d at 232-233.

On the basis of the direct and circumstantial evidence presented in this case, the trial court properly denied appellant Proctor's motion for judgment of acquittal. Since

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[11] Luck did not drive his own car because Armstead knew where the employment office was located (Tr. 163).

[12] Appellant Proctor did relate that Luck was wearing a blue and white sailor hat (Tr. 140).

[13] Appellant Armstead testified that, prior to visiting Proctor at approximately 1:30 p.m. on June 13, he had been with his girl friend (Tr. 159-162). However, he had seen her only once or twice since his arrest, and she was not present in court (Tr. 171).

appellant Proctor admits that "all of the elements comprising the *corpus delicti* of each of these criminal offenses were proved beyond a reasonable doubt" (Appellant's Br. at 29), we need consider only whether the Government met the test of *Curley* and *Crawford* in proving appellant Proctor's identity as a participant in the offenses.[14]

Direct and circumstantial evidence are to be accorded the same weight in evaluating the sufficiency of the Government's case. *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954); *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 3, 316 F.2d 652, 655 (1963). In the instant case, a review of all the evidence provides substantial support for all the convictions under the *Curley-Crawford* guidelines. On June 13, 1969, during the noon hour, the houses at 804 and 808 Elder Street, N.W., were burglarized (Tr. 41-44, 49), and Reverend Isadore Richards was robbed of $23 (Tr. 38). Two eyewitnesses testified as to the appearances of the three marauders. Reverend Richards admitted that he could not identify the men because his observations were too brief (Tr. 38), but he did remember that two of them wore white sailor hats with the brims pulled down and that one wore a blue outfit while the other wore a tan and brown outfit (Tr. 7-8). Mrs. Croci remembered only that one man wore light pants, tennis shoes, a short-sleeved shirt and a sailor cap pulled down (Tr. 50).[15] She further testified that the three men

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[14] The Government and appellant Proctor stipulated that the Cozzi and Richards homes were burglarized on June 13, 1969, and that the property taken from each had a value of more than $100. We note that in announcing this stipulation the prosecutor erroneously referred to Mrs. Ozala Cozzi as "Mrs. Ozala Richards" (Tr. 39-40).

[15] Appellant Proctor emphasizes that the eyewitness testimony concerning the heights of the men was inconsistent with the actual heights of the men (Appellant's Br. at 30-31). Both witnesses only viewed the culprits for fleeting moments; Reverend Richards was unsure of exact heights (Tr. 38), and Mrs. Croci could only estimate the height of one of the men (Tr. 56). The testimony indicates that at least some of the burglars wore hats. We view the inconsistencies as reasonable under the circumstances and certainly not fatal to the sufficiency of the evidence.

who ran from the Richards house were on their way toward a new blue Impala and that she gave at least part of the car's Virginia license number to the police (Tr. 55). Detective Kerick testified that at approximately 2:30 p.m., after receiving a lookout description of the car and its three occupants (Tr. 58-59, 68-69), he and his partner stopped a 1969 blue Chevrolet with Virginia license number 85-274 occupied by three Negro males (Tr. 58-59). Appellant Armstead was seated in the driver's seat and wore a tan short-sleeved shirt; appellant Proctor was seated in the front passenger seat and wore a blue and white shirt; Charles Luck was seated in the back seat and wore a sailor hat (Tr. 59-65).[16]

The similarity between the descriptions given by the two eyewitnesses and the clothes worn by appellants Proctor and Armstead is obvious. This similarity, coupled with the furtive movements by appellant Proctor when the police arrived (Tr. 97), the recovery of one pistol from the floor in front of Proctor's seat and of Mr. Richard's pistol from the back seat,[17] and the discovery of a portion of the property stolen from both the Cozzi and Richards homes in the trunk of the car, along with the inferences to be drawn from the possession of recently stolen property provided evidence far in excess of what is necessary to support the convictions.

II. The trial court properly instructed the jury on the inference to be drawn from possession of recently stolen property.

(Tr. 7-9, 48-49, 97-98, 140, 324)

The trial court instructed the jury concerning the inference to be drawn from the possession of recently stolen property in accordance with the principles later upheld

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[16] Detective Kerick's testimony that Luck wore the sailor hat was corroborated by appellant Proctor when he related that Luck wore a "blue and white sailor hat" (Tr. 140).

[17] Charles Luck was attempting to stuff it behind the seats (Tr. 97).

by this Court in *United States* v. *Coggins*, —— U.S. App. D.C. ——, —— n.31, 433 F.2d 1357, 1361-1362 n.31 (1970), and *United States* v. *Johnson*, —— U.S. App. D.C. ——, —— n.17, 433 F.2d 1160, 1163 n.17 (1970). Although appellant Proctor agreed with the trial court that the instruction given was "as fair to everybody as we could achieve" (Tr. 324), he now reasons that the inference cannot be utilized to convict an individual of multiple and separate larcenous takings except as to those stolen articles in his actual possession" and contends that, since appellant was not in actual or constructive possession of any of the purloined articles, the inference cannot be used against appellant at all (Appellant Proctor's Br. at 38). By considering the fact that there were separate larcenies, multiple articles taken, and multiple defendants in possession of all the stolen goods, appellant Proctor claims that the inference becomes inoperative. This is simply not the law.

In *United States* v. *Johnson, supra*, this Court affirmed convictions based upon employment of the inference with respect to two separate larcenies occurring many months apart and months before the suspects were apprehended in possession of the proceeds. Appellant is therefore mistaken in his claim that for the inference to be operative there must be "a single act of taking" (Appellant Proctor's Br. at 37), since this Court upheld the use of the inference in the *Johnson* case where two separate takings occurred.

United States v. *Coggins, supra*, dealt with the applicability of the inference when many articles are taken and fewer than all are recovered. This Court held that in all situations where it is not absolutely clear that all of the items were purloined by a single act, the trial court should instruct the jury that the inference does not apply to unpossessed articles unless there is proof beyond a reasonable doubt that they were stolen along with the possessed articles. *Coggins, supra*, —— U.S. App. D.C. at ——, 432 F.2d at 1362. In the instant case, since the evidence was absolutely clear that all items taken from

the Cozzi house and all items taken from the Richards house were removed in two "single acts," further instruction was unnecessary. In the context of the evidence and the trial judge's full charge, the omission of any additional charge as to unpossessed property could not have misled the jury. *Coggins, supra,* —— U.S. App. D.C. at ——, 433 F.2d at 1363.

United States v. *Johnson, supra,* also dealt with joint possession of stolen property and held that "exclusive possession" as used in *Pendergrast*[18] means merely that the accused must bear a distinctive relationship to the property before the inference is allowable. We must look to the association between the accused and the property and ascertain whether the association "attains such quality that, when coupled with the other evidence, there is a probability of guilt that a prudent mind could accept as not reasonably doubtful." *Johnson, supra,* —— U.S. App. D.C. at ——, 433 F.2d at 1165. The exclusivity requirement may be satisfied even though the property is not subject to the accused's direct physical control or the accused shares possession of the property with others. Circumstantial evidence of possession is sufficient to activate the inference. *Johnson, supra,* —— U.S. App. D.C. at ——, 433 F.2d at 1165.

In the instant case appellant Proctor wore a shirt similar in color to that worn by one of the thieves. He was apprehended within two to three hours after the offenses in an automobile fitting the description of the car used by the culprits. He was arrested in the company of two other Negro males, one wearing a shirt fitting the description of that worn by another of the thieves and the other wearing the inculpatory sailor hat. Appellant Proctor attempted to hide a gun when confronted by the police, and his companion attempted to stuff one of the fruits of one of the burglaries into the opening in the back seat (Tr. 7-9, 48-49, 97-98). When considered in context with the totality of the circumstances in which appellant was ap-

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[18] *Pendergrast* v. *United States,* 135 U.S. App. D.C. 20, 416 F.2d 776, *cert. denied,* 395 U.S. 929 (1969).

prehended, the inference becomes completely reasonable.[19] A jury could reasonably infer that appellant knew of the stolen property in the back seat and in the trunk and shared joint control over it.

III. The trial court properly denied appellants' motion to suppress evidence.

(Mot. Tr. 7-8, 10, 12, 34, Tr. 59, 66, 97, 139-140)

Both appellants Proctor and Armstead contend that the police lacked probable cause to arrest them, and that consequently the evidence obtained as a result of that arrest should have been suppressed. In so arguing they misconstrue the very fundamentals of the law of arrest.

In *Bailey* v. *United States*, *supra*, this Court had occasion to summarize the applicable standards for determining the existence of probable cause:

> Probable cause is a plastic concept whose existence depends on the facts and circumstances of the particular case. It has been said that " '[t]he substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' " *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949). Much less evidence than is required to establish guilt is necessary. *Draper* v. *United States*, 358 U.S. 307, 311-312 (1959). The standard is that of a "reasonable, cautious and prudent peace officer" and must be judged in the light of his experience and training. *Bell* v. *United States*, 102 U.S. App. D.C. 383, 254 F.2d 82, 86, *cert. denied*, 358 U.S. 885 (1958). The police must have enough information to "warrant a man of reasonable caution in the belief" that a crime has been committed and that the person arrested has

[19] It has been held that possession may be reasonably inferred from circumstances surrounding the finding of stolen goods. *E.g.*, *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967). In *United States* v. *Jones*, 340 F.2d 913 (7th Cir. 1964), the suspicious circumstances established a reasonable inference that the defendant knew of the presence of a shotgun in the trunk of the car and exercised "joint control, care and management over it." *Id.* at 915.

committed it. *Carroll* v. *United States*, 267 U.S. 132, 162 (1925). *See also Henry* v. *United States*, [361 U.S. 98, 102 (1959)]. A finding of probable cause depends on the "practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, *supra*, 338 U.S. at 175.

In the instant case, at approximately 1:00 p.m. Detectives Haynes and Kerick received a dispatch for a robbery and burglary involving (1) three Negro males, (2) one man wearing gray pants and a blue and white striped shirt and another wearing a tan shirt, (3) one man wearing a white sailor hat, and (4) all in a blue automobile bearing Virginia rental tags beginning with "85" (Mot. Tr. 7-8). Testimony at the pre-trial hearing and at trial indicates that at approximately 2:40 p.m. the detectives observed (1) appellants Proctor and Armstead and Charles Luck. (2) Appellant Proctor wore a blue and white striped shirt, and appellant Armstead wore a tan shirt. (3) Charles Luck wore a sailor hat.[20] (4) The men were occupants of a blue Chevrolet with Virginia rental tags beginning with "85" (Mot. Tr. 10, Tr. 59, 66). Certainly the detectives had probable cause to believe that these suspects had committed the offenses and could properly have stopped the automobile and arrested its occupants. However, before the officers could effectuate the arrest, Detective Haynes observed appellant Proctor place an object on the floor of the car. When the door was opened,[21] he ascertained that this object was in-

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[20] We note an inconsistency in the testimony as to whether Charles Luck or Appellant Proctor was seen wearing the sailor's hat (Mot. Tr. 10, Tr. 59).

[21] Detective Haynes testified at the pre-trial hearing that he opened the door and then announced that the occupants had a gun (Mot. Tr. 12), whereas he stated at trial that he warned his partner that the men had a gun before he opened the car door (Tr. 97). Appellant Proctor testified that he opened the door before the police reached the car (Tr. 139-140). Under any of these versions of the facts the seizure of the weapon was certainly proper.

deed a pistol (Mot. Tr. 12, Tr. 97), and he saw Luck trying to stuff another pistol behind the back seat. The immediate seizure of these weapons in plain view cannot be questioned.[22]

Since the arrest was based upon probable cause, the search of the car incidental to that arrest was entirely proper. *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *United States* v. *Free*, D.C. Cir. No. 23,221, decided August 12, 1970; *Bailey* v. *United States*, *supra*. It is well settled that the permissible scope of such a search at the scene of arrest includes a search of the automobile trunk. *Wright* v. *United States*, 131 U.S. App. D.C. 279, 281 n.5, 404 F.2d 1256, 1258 n.5 (1968); *Jefferson* v. *United States*, 121 U.S. App. D.C. 279, 349 F.2d 714 (1965); *Adams* v. *United States*, 118 U.S. App. D.C. 364, 336 F.2d 752 (1964), *cert. denied*, 379 U.S. 977 (1965).[23]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JEROME WIENER,
Assistant United States Attorneys.

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[22] The Government agreed at the pre-trial hearing that the arrest occurred when the officers alighted from the car (Mot. Tr. 34).

[23] Appellant Armstead attempts to distinguish the facts in *Adams* from those of the instant case by emphasizing that *Adams* involved an arrest within one half-hour after the offense and in proximity to the scene of the crime (Appellant Armstead's Br. at 12-13). These factors have no bearing, however, on the propriety of the search; rather, the only possible question would be whether the search was reasonable, a question which must in any event be answered in the light of *Chambers* v. *Maroney*, *supra*.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.	)	No. 24,335
JAMES A. PROCTOR, Appellant.	)	
UNITED STATES OF AMERICA Appellee,	)	
v.	)	No. 24,336
ROBERT L. ARMSTEAD, Appellant.	)	

JOINT PETITION FOR REHEARING AND/OR SUGGESTION FOR REHEARING EN BANC

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July 28, 1971

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 24,335
JAMES A. PROCTOR, Appellant.	)	
UNITED STATES OF AMERICA Appellee,	)	
v.	)	No. 24,336
ROBERT L. ARMSTEAD, Appellant.	)	

JOINT PETITION FOR REHEARING AND/OR
SUGGESTION FOR REHEARING EN BANC

The appellant James A. Proctor and the appellant Robert L. Armstead hereby jointly petition for a rehearing of the per curiam affirmance of their convictions. The judgment of affirmance, following an oral argument, was entered on June 18, 1971, by order of Circuit Judges Wright, MacKinnon and Robb.[1/] No opinion accompanied that judgment.

[1/] By order of Chief Judge Bazelon, the time for filing this petition was extended to and including July 30, 1971.

These two appeals were previously consolidated for all purposes. See order of Chief Judge Bazelon in Chambers, dated October 20, 1970.

Alternatively, these two appellants suggest and request an en banc consideration of this petition for rehearing, including an en banc determination of the merits should rehearing be granted. The issues raised on these appeals are of sufficient importance under the Constitution and in the administration of the criminal law in the District of Columbia to warrant such en banc consideration.

The Relevant Facts

Since the Court issued no opinion in affirming the convictions, it becomes necessary here in light of the en banc suggestion to restate the basic, uncontested facts:

1. Two houses in the 800 block of Elder Street, N. W., Washington, D. C., were burglarized on the morning of June 13, 1969. Substantial amounts of personal property were taken from each house. Three black males were seen in the process of taking property from the house at 808 Elder and departing in a metallic blue automobile. But no one observed who or how many were involved in burglarizing the other house at 804 Elder.

2. About an hour later, a police description of the burglaries and of the three black male suspects was broadcast to police patrols. An hour or so after receiving this broadcast, two cruising police officers noticed a blue automobile containing three black males proceeding in a lawful manner

about six miles from the scene of the burglaries. The car was stopped and, upon observing a gun in the front seat, the officers approached with guns in hand. Arrests were made without resistance and the automobile was immediately searched on the scene.

3. At the time of the arrests, the appellant Armstead was the driver of the blue car; the appellant Proctor was a passenger in the front seat; and one Charles Luck was in the back seat alone.[2/] The arresting officers identified these three men in terms that substantially differed, particularly as to height, from the descriptions in the police radio bulletin. Significantly, the eye-witnesses were unable to identify these three men as the culprits at the subsequent police line-up.

4. No arrest warrant or search warrant was ever sought or obtained. The search of the car included opening the locked trunk with the car keys. Within the trunk several small items taken from the two houses were discovered, but the value of such items was considerably less than $100. Inside the car the only stolen article discovered was a revolver on the person

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2/ Luck later pleaded guilty and is not involved in these appeals.

of the individual in the back seat, Charles Luck. No other stolen property was found inside the car, or on or near the persons of the two appellants.

5. There was uncontradicted testimony by the appellants themselves that they had met Luck some time after the burglary incidents and at the time of the arrests were driving to an employment agency in search of work.

6. Both appellants were convicted on two counts of grand larceny and two counts of second degree burglary, the multiple counts relating to the takings from the two respective houses. They were also convicted on one count of robbery, although the person who allegedly robbed the individual within 808 Elder Street was never identified.

Questions on Rehearing

1. Whether there was any evidence, direct or circumstantial, from which the jury could determine beyond a reasonable doubt that the appellants were the ones who committed the crimes of second degree burglary, grand larceny and robbery.

2. Whether it was proper to give the jury the general "red book instruction" as to the inference of guilt from unexplained possession of recently stolen property where (a) there were multiple larcenous takings and multiple suspects, (b) the

recovered stolen property as to each taking was valued at less than $100, (c) there was no stolen property found on the persons of the accused or in the area under their dominion, and (d) there was no other competent evidence to identify the accused as being the culprits.

3. Whether the Fourth Amendment permits a warrantless search of the locked trunk of an automobile where there was no probable cause to suspect that any contraband articles were hidden in the trunk some three or four hours after the alleged takings.

Reasons for Rehearing

The per curiam affirmance of these convictions leaves unexplained and unanswered several critical problems in the fair administration of criminal justice. Those problems clearly justify rehearing en banc.

(1) The inference instruction.

The critical element at the trial and on these appeals involved the utilization of the well-known evidentiary rule authorizing an inference of guilt from the unexplained or unsatisfactorily explained possession of recently stolen property. The guilt or innocence of these appellants turns upon a proper and careful application of the rule, for unless the jury could

draw such an inference under proper instruction there was no proof whatever that these appellants were the guilty thieves.

But in several respects, the affirmance of these convictions based upon the use of that inference is in direct conflict with the principles established and recognized by this Court in Pendergrast v. United States, 135 U.S.App.D.C. 20, 416 F.2d 776 (1969); United States v. Johnson, 140 U.S.App.D.C. —, 433 F.2d 1160 (1970); and United States v. Coggins, 140 U.S. App.D.C. —, 433 F.2d 1357(1970).

(a) Over the express objection of counsel for the appellant Proctor, the District Judge declined to give to the jury the model instruction suggested by this Court in the appendix to the Pendergrast opinion. Tr. 323. Instead, the judge gave what he called "the red book instruction," which contained the inadequacies that led to the formulation of the Pendergrast model.

(b) A critical question is here raised by the fact that the Government failed to prove that either of the appellants had "possession" of the property recently stolen. The Government did not prove that the appellants even knew that any of the stolen items were secreted in the car. See Coggins, 433 F:2d at 1360, fn. 22. And there was no evidence that they had exclusive possession or control relative to such items. Nor was either appellant's "presence in the car at the time of the

arrests sufficient, we think, to show that he was in possession of the recently stolen articles here involved." Goodwin v. United States, 121 U.S.App.D.C. 9, 11, 347 F.2d 793, 795 (1965). But as Pendergrast made clear, 135 U.S.App.D.C. at 31, 416 F.2d at 787, "The inference is indulged only where the accused is found in exclusive possession of property recently stolen and the possession is not otherwise explained." The inference, in short, would appear to be completely inapplicable, and any instruction regarding or permitting its use must be considered reversible error.

(c) The propriety of the use of the inference in this instance is complicated by the fact that the inference is being superimposed upon multiple suspects and multiple acts of taking. And a further complication arises from the fact that the stolen items found in the car had a value below the line dividing grand and petit larceny, though the value of all the goods stolen from each of the two houses was above that line. These complications create several problems worthy of consideration on rehearing:

(i) Where, as here, there have been multi-item thefts and not all the items have been recovered, Coggins holds that it is "indispensably necessary in all instances" that the trial court's instructions "should also tell the jury that its

consideration of unpossessed articles necessitates proof beyond a reasonable doubt that they were stolen along with the possessed articles." 433 F.2d at 1362. No such "indispensably necessary" instruction was here given.

Indeed, the failure to give that instruction permitted the jury to do precisely what Coggins said they should not be permitted to do —— i.e., "attribution to the accused of a taking of all when he might well have taken only some." 433 F.2d at 1362. Thus the jury here might have attributed to the appellants a taking of all the items from both houses, as well as the gun taken by robbery, when in fact one or both appellants might have taken items from only one house, or not have participated in the robbery. It will be recalled that there was no proof as to the number of individuals participating in the takings from 804 Elder; nor was there any proof that such takings took place at the time when the separate incidents occurred at 808 Elder.

(ii) In situations such as this, where there are separate and multiple takings, the opinion in Coggins indicates that the operation of the inference may be limited to those goods found in the accused's actual possession. 433 F.2d at 1361, fn. 29, citing Clark v. State, 152 Tex.Crim. 446, 215 S.W.2d 184, 186-187 (1948). If the inference is so limited,

of course, it could have no application here since none of the stolen goods can be said to have been in the appellants' "actual possession."

(iii) Even if the stolen items secreted in the car were held to be in the appellants' possession, another restriction on the use of the inference arises. The stolen items that were recovered, considered together or segregated in relation to the separate takings from the two houses, fell well below the $100 valuation line so essential to grand larceny charges.

But in order to sustain grand larceny charges by use of the inference, Coggins indicates that there must be "a showing, independent of the inference, that all of the items were taken at the same time," a showing that "vitalizes the rule." 433 F.2d at 1361. There was no such independent showing in this case. There was no showing, for instance, that the sole item recovered in the car from the takings at 804 Elder, the revolver, was stolen at the same time as the many unrecovered items stolen from that house; indeed, the record is totally silent as to the circumstances of the events at 804 Elder. Nor was there any evidence that the separate takings from the two houses were a unitary operation, a planned single act perpetrated by the same three individuals who were observed at 808 Elder.[3/]

3/ Moreover, there was no substantial or unique relationship between the appellants and the few items secreted in the locked trunk of the car that, to a "reasonable-minded juror," might "indicate a joint enterprise" involving the stealing of such items from two or more homes. Cf. United States v. Johnson, 433 F.2d at 1165-1166.

Absent such proof, the grand larceny convictions cannot stand.

Such, then, are the various significant and unanswered questions generated by the use in this case of the inference of guilt from the unexplained possession of recently stolen property. The summary affirmance of these convictions does not serve to answer or quiet those questions and an objective reading of this record leaves one with the chilling impression that the guilt of these two appellants has simply not been proved. A rehearing and reconsideration are most essential.

(2) The reasonableness of the search.

Another vital but unanswered question in this case concerns the constitutional validity of the warrantless search of the automobile at the scene of the arrests. That question, too, deserves consideration by an en banc court on rehearing.

The Government has sought to sustain the search and the seizure of the items found in the locked trunk by the claim that the search of the car was incidental to the arrests and hence "entirely proper." Brief, p. 13. But even assuming the arrests to be justified, it does not necessarily follow that every search hard on the heels of an arrest must be considered "entirely proper." The Supreme Court in Chimel v. California, 395 U.S. 752 (1969), has limited the concept of "search incident to arrest" to three situations: (1) a search of the

arrested person to remove weapons he might use to resist arrest or effect escape; (2) a search for evidence on the arrestee's person to prevent its concealment or destruction; and (3) a search of the area within the arrestee's immediate control, from which he might gain possession of a weapon or destructible evidence. 395 U.S. at 763. Any search beyond those three categories, absent a warrant, is per se unconstitutional, at least where there is no cause and no occasion to suspect more hidden contraband.

While the Court in Chimel was dealing with a search of a house that went beyond the bounds of constitutional reasonableness, the Court did not exclude the search of automobiles from these constitutional restrictions. There obviously are practical and constitutional differences between the reasonableness that justifies a search of a home and the reasonableness underlying a search of a movable object like an automobile. See Carroll v. United States, 267 U.S. 132, 153-156, 158-159 (1925). But those differences do not pertain to the scope of constitutional reasonableness of a search as an incident to an arrest. The differences extend only to the greater cause which an arresting officer may have to suspect at the time of the arrest that contraband is hidden in an automobile.

Thus in Chimel, 396 U.S. at 763-764, the Court noted with approval that Preston v. United States, 376 U.S. 364 (1964),

had held unreasonable the search of a locked trunk of an automobile where the search was made at another place some time after the arrest. And as explained in Chambers v. Maroney, 399 U.S. 42, 47 (1970), it was apparent in Preston at the time of the arrest "that the officers had no cause to believe that evidence of crime was concealed in the auto." See also Cooper v. California, 386 U.S. 58, 59-60 (1966). The thorough but warrantless search of the automobile involved in the Chambers case was approved only because "the police had probable cause to believe that the robbers, carrying guns and the fruits of the crime, had fled the scene in a light blue compact station wagon . . . [and there was] probable cause to search the car for guns and stolen money." 399 U.S. at 47-48. See also Williams v. United States, 401 U.S. 646 (1971).

The short of it is that under the Fourth Amendment a reasonable search of a car, as an incident to arrest, cannot go beyond the person of the arrestee or the area in the car within his immediate control —— unless there is probable cause to suspect that contraband is hidden in the car.[4/] Tested by

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[4/] In light of the Supreme Court's rulings in Preston and Chimel, this Court's contrary decision in Adams v. United States, 118 U.S. App. D.C. 364, 336 F.2d 752 (1964), can no longer be considered as an accurate statement as to the right to search a locked trunk of a car without a warrant.

that standard, the search and seizure in this case cannot be sustained. The arresting officers had no reason to suspect that, some three hours after the crimes in question, the culprits were still in hot flight from the scene in an automobile laden with the stolen articles. All they knew was that three poorly identified individuals had much earlier been seen driving east in a poorly identified blue automobile, and that the suspects had "obtained approximately $23 in bills and unknown amount of merchandise" from the burglaries.

Such sketchy information hardly qualifies as the probable cause that is constitutionally necessary to justify a warrantless search beyond the person of the arrestee and the area under his immediate control.

Conclusion

For these various reasons, this petition for rehearing should be granted, the judgment of affirmance vacated, and the appeals reheard and reconsidered by this Court en banc.

Respectfully submitted,

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Certificate of Counsel

We hereby certify that this petition for rehearing and/or suggestion for rehearing en banc is filed in good faith and not for purposes of delay.

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Certificate of Service

I hereby certify that on this 28 day of July, 1971, a copy of this petition for rehearing and/or suggestion for rehearing en banc was personally delivered to the Office of the United States Attorney, Appellate Division, John A. Terry, Chief, in the United States Courthouse, Washington, D. C.

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